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RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA, et. al,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF THE STATE OF CALIFORNIA, ET. AL.,
AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

Amici curiae are states that have an interest in avoiding substantial expenditures of resources in the federal courts litigating whether a petition for writ of habeas corpus is moot after the petitioner is released from state custody. In the wake of this Court's conflicting decisions on the issue, a number of circuit courts have adopted approaches to the mootness issue that are inconsistent with a sound and reasoned application of the jurisdictional requirement in Article III of the Constitution. Amici curiae seek to reaffirm the constitutional limits on the authority of the federal courts to review state court judgments.

SUMMARY OF ARGUMENT

In *Lane v. Williams*, 455 U.S. 624, 631-633 (1982), this Court set forth a concrete, workable test of "collateral consequences" that establish a continuing case or controversy after a federal habeas petitioner is released from state custody. However, in dicta in *Evitts v. Lucey*, 469 U.S. 387, 391 n. 4 (1985), this Court harkened back to earlier decisions which employed a far more expansive test. Relying on that dicta, the lower courts have largely ignored or distinguished *Lane*, thereby eroding the mootness doctrine to the point of complete elimination in some circuits. In order to preserve the jurisdictional requirement mandated by the Constitution, this Court should reaffirm *Lane's* holding that the federal courts can decide a habeas corpus action after the petitioner is released from custody only when the collateral consequences of the challenged criminal proceeding trigger "existing civil disabilities" that survive completion of the sentence. *Lane* at 632 & n. 13. This Court also should reaffirm *Lane's* placement of the burden on the petitioner to identify the specific collateral consequences that outlive his release from custody. *Id.* at 633 n. 13. Such limits are vital in order to safeguard from extinction the Constitution's case or controversy requirement as it applies on habeas corpus.

ARGUMENT

THE "COLLATERAL CONSEQUENCES" THAT MAY OVERCOME MOOTNESS AFTER A HABEAS PETITIONER'S RELEASE FROM CUSTODY SHOULD BE LIMITED TO "EXISTING CIVIL DISABILITIES" THAT SURVIVE COMPETITION OF THE SENTENCE

Article III of the Constitution confers jurisdiction on the federal courts to hear only those actions where a genuine case or controversy exists. This guarantees that the federal courts will decide cases involving live issues that actually affect the rights of the litigants, not those involving moot or abstract propositions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). The resolution of this question "is essential if federal courts are to function within their constitutional sphere of authority." *Id.*

A case must be dismissed as moot "when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Moore v. Calderon*, 116 S.Ct. 2066, 2067 (1996) (per curiam) (citation omitted). This Court has "furnished contradictory signals" as to when a federal court can grant effectual relief on habeas corpus after a criminal defendant's sentence has expired. See *Robbins v. Christianson*, 904 F.2d 492, 496 (9th Cir. 1990) (Noonan, J., dissenting). Historically, the writ lies only to terminate wrongful confinement. *Fay v. Noia*, 372 U.S. 391, 430-431 (1963). However, this Court has created an exception to the mootness doctrine where "collateral legal consequences" flow from the challenged criminal proceeding, even after the defendant is released from custody. *Sibron v. New York*, 392 U.S. 40, 53-54 (1968). The unresolved question is what constitutes such a collateral consequence.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court held that the defendant's habeas petition was not moot after the expiration of his sentence, because under New York law his

felony conviction prevented him from engaging in business activities, voting, and serving as a juror or labor union official.¹ *Id.* at 237-238. The statutory disabilities on which the Court relied were those that had a current adverse effect on the defendant.

This Court expanded the *Carafas* doctrine in *Sibron v. New York*, 392 U.S. 40, by holding broadly that after a defendant has completed the sentence the case is moot only if there is "no possibility that any collateral legal consequences" will result from the conviction. The Court acknowledged that in its early cases it had required the defendant to identify the collateral consequences that outlived custody, but in subsequent cases the Court in effect presumed that collateral consequences existed after the defendant's release. *Sibron* at 54-55; compare *St. Pierre v. United States*, 319 U.S. 41 (1943), with *Pollard v. United States*, 352 U.S. 354 (1957). The *Sibron* Court found that none of the "concededly imperative policies behind the constitutional rule against entertaining moot controversies" would be served by dismissing the case before it, because under New York law *Sibron's* misdemeanor conviction could be used to enhance his sentence in future criminal proceedings and to impeach his character in a future trial. *Sibron* at 55-57.

In *Lane v. Williams*, 455 U.S. 624 (1982), this Court took a much narrower view of collateral consequences. In that case, the two defendants contested their reincarceration for parole violations because they were not advised of the state's mandatory parole period. The Court placed the burden of rebutting the state's mootness argument back on defendants,

1. In *Carafas*, the Court also found that the defendant met the statutory "in custody" requirement, because he was incarcerated when he filed the habeas petition. 391 U.S. at 238-239. However, in order to demonstrate constitutional jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complain is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1973). As statutory mootness is not at issue here, Spencer's discussion of it in his opening brief is irrelevant. See Brief for Petitioner at 32-33.

stating, "Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." *Id.* at 633 n. 13. The Court emphasized that no "existing civil disabilities" stemmed from the finding that the defendants had violated parole, as was the case in *Carafas* and *Sibron*, where additional penalties based on the convictions were prescribed by state law. *Id.* at 632 n. 13. Moreover, although Illinois law permitted the parole board to consider these revocations in future parole determinations, the defendants were "able -- and indeed required by law -- to prevent such a possibility from occurring," by refraining from committing additional crimes. *Id.* at 632-33 n. 13. The Court also rejected the notion that the defendants' employment prospects or the possibility of future sentence enhancements constituted collateral consequences, because an employer or judge could consider the conduct underlying the parole revocations even if the findings were vacated. *Id.* at 632-633.

Subsequently, in dicta in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court stated in a footnote that the defendant's challenge to his criminal conviction was not moot despite his release from custody and the restoration of his civil rights. Without citing *Lane*, the Court appeared to adopt an even broader test of collateral consequences than it had used in *Sibron*, implying that constitutional jurisdiction existed unless and until the defendant was actually *pardoned*, because his conviction still subjected him to persistent felony offender prosecution and potential impeachment in future proceedings. *Id.* at 391 n. 4; see also *Minnesota v. Dickerson*, 508 U.S. 366, 371 n. 2 (1993) (although no statutory disabilities attached to drug charge that was dismissed upon successful completion of diversion, habeas challenge was not moot because state law allowed "use" in future criminal proceedings).

In the wake of these Supreme Court cases, some circuit courts have effectively deleted the constitutionally mandated case or controversy requirement in habeas corpus cases. In *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994), the

Ninth Circuit found that the *Sibron* "presumption" that collateral consequences result from a criminal conviction is "irrebuttable," because "[o]nce convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state laws that either already have been or may eventually be passed." *Id.* at 1473 (emphasis added). A subsequent Ninth Circuit panel reluctantly followed *Chacon* as circuit precedent, although it believed the case was moot because the defendant had not alleged or proven that he would suffer any collateral consequences as a result of his misdemeanor convictions. *Larche v. Simons*, 53 F.3d 1068, 1069-1071 (9th Cir. 1995). The *Larche* court stated, "To allow the Great Writ to be used in extremely minor cases, after sentences have been served, in the name of defendants who may not face, or perhaps are not concerned with, potential collateral consequences, is not only to cheapen the writ, but also to invite an onslaught of litigation into the federal judiciary." *Id.* at 1071 (emphasis added).

The Seventh Circuit also has established a virtually irrebuttable presumption of collateral consequences based on theoretical future events. In *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143 (7th Cir. 1991), cert. denied, 502 U.S. 1104 (1992), the 11-year-old minor challenged a juvenile adjudication that admittedly did not trigger the "civil disabilities 'ordinarily resulting from the conviction of a crime.'" *Id.* at 1148. Relying on *Evitts* over *Lane*, the court found sufficient collateral consequences from the possible use of the adjudication in an adult presentence report or in future juvenile proceedings, for impeachment purposes if the minor were ever a witness, and in any future child custody proceeding, including one involving the custody of her own as yet unborn children. *Id.* at 1148-1150. In dissent, Judge Easterbrook contended the court had exceeded its constitutional jurisdiction by relying on factors that did not qualify as "civil disabilities," because none was "a legal disability imposed by the government." *Id.* at 1154. He also strongly criticized the court for taking the view that "a case is not moot

unless there is zero probability that the judgment will ever affect the future interaction of the parties." *Id.* at 1155.

In the context of challenges to probation or parole revocations, several circuits have relied on the *Evitts* footnote to find no mootness, notwithstanding the authority of *Lane* on that specific issue. In *Robbins v. Christianson*, 904 F.2d 492, 495-496 (9th Cir. 1990), the Ninth Circuit found that collateral consequences survived the defendant's disciplinary proceeding for drug use while on conditional release, because he would be subject to greater penalties under the federal sentencing guidelines if he ever violated federal law in the future, and he might lose a job if a potential employer happened to learn about the proceeding. Similarly, in *United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991), the Second Circuit found the case was not moot because under New York law a probation violation could influence the possibility of parole on a subsequent unrelated charge.

Other courts also have eliminated immediacy and substituted remote possibility as the test of collateral consequences, thereby contributing to the erosion of the constitutional jurisdiction requirement. E.g., *United States v. Schmidt*, 99 F.3d 315, 317 (9th Cir. 1996) (90-day sentence for probation violation admittedly had no "direct affect" on future sentences, but could "indirectly" affect sentence under federal guidelines); *Sanchez v. Mondragon*, 858 F.2d 1462, 1463 n. 1 (10th Cir. 1988) (unspecified collateral consequences resulting from "unpardoned" conviction were sufficient to preclude mootness); *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 408 (7th Cir. 1985) (case not moot because of possibility that conviction "might someday be used to enhance his punishment for a later crime"); *United States v. Maldonado*, 735 F.2d 809, 813 (5th Cir. 1984) (misdemeanor challenge not moot because of possibility of future sentence enhancement, impeachment, and bail ramifications).

Thus, if the mootness doctrine is to survive at all, this Court should reaffirm *Lane's* holding that only "existing civil disabilities," i.e., sanctions imposed by law that have a current

adverse effect on the defendant, constitute collateral consequences. *Lane* at 632 & n. 13. This test of collateral consequences would ensure that federal courts function within their constitutional sphere of authority, resulting in greater finality of state court judgments. It would also bring predictability and uniformity to the determination of federal jurisdiction. Further, in the interest of clarity and consistency, this approach should apply equally to challenges to both criminal convictions and revocations of probation or parole.

The *Lane* approach also would prevent the circuit courts from "[u]sing teensy possibilities of extra-legal effects to find a continuing case or controversy." *D.S.A. v. Circuit Court Branch 1*, 942 F.2d at 1155 (Easterbrook, J., dissenting). A claim that is moot should not be revived by a conjectural consequence that is essentially unripe because it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580-581 (1985). Thus, like claims that fail to meet Article III jurisdiction because they are insufficiently real and concrete, see *Babbitt v. United Farm Workers Union*, 442 U.S. 289, 304 (1979), the possibility of a future sentence enhancement that may occur if the defendant ever commits another crime is too theoretical and uncertain to overcome mootness. *Lane* at 632-633 n. 13. A fortiori, the possibility of a future sentence enhancement under legislation that "may eventually be passed," see *Chacon v. Wood*, 36 F.3d at 1473, is so wildly speculative that it could never constitute an "existing" civil disability. As this Court noted in *Lane*, "Collateral review of a final judgment is not an endeavor to be undertaken lightly." *Lane* at 633. Reaffirmation of the *Lane* approach would restore the constitutionally mandated jurisdictional requirement to habeas corpus cases.

Additionally, this Court should adopt *Lane*'s holding that the defendant bears the burden to show "actual harm from the judgment that he seeks to avoid." *Lane* at 633 n. 13; see *St. Pierre v. United States*, 319 U.S. at 43 (case was moot after defendant was released from custody because he had not "shown

that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied"); see also *North Carolina v. Rice*, 404 U.S. at 248 (case remanded because record did not show "whether there may be benefits to respondent under North Carolina law in having his sentence reduced after he has served that sentence;" burden of proof on remand was not specified but appeared to fall on defendant).

The "presumption" employed in *Sibron* requires the state to prove a globally broad negative, i.e., that there is "no possibility that any collateral legal consequences will be imposed." *Sibron* at 57. However, the defendant clearly is in the best position to identify the particular collateral consequences that concern him. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 633-634 n. 2 (1968) (defendant's conviction for selling erotic magazines to minor subjected him to revocation of his license to run diner under local municipal law). Thus, once the state shows that the petitioner has been released from custody, he should bear the burden to show that he continues to be subject to collateral consequences despite the expiration of his sentence.

CONCLUSION

For the reasons stated, amici curiae respectfully ask this Court to restrict the "collateral consequences" that establish a continuing case or controversy after a petitioner's release from custody to "existing civil disabilities" that result from the challenged criminal proceeding, and to place the burden on the petitioner to identify those specific collateral consequences.

Dated: July 22, 1997.

Respectfully submitted,

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IN THE
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OCTOBER TERM 1997

RANDY G. SPENCER,
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v.

MICHAEL L. KEMNA, et al.,
Respondents

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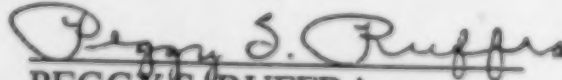
PEGGY S. RUFFRA, a member of the Bar of the Supreme Court of the United States, states:

That her business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on July 23, 1997, she served three true copies of the **BRIEF OF THE STATE OF CALIFORNIA, et al., AS AMICI CURIAE IN SUPPORT OF RESPONDENT** in the above-entitled matter on the parties by placing same in envelope addressed as follows:

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